

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>KIMO ENTERPRISES, INC.</b>	:	
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period February 1, 1999.	:	DETERMINATION DTA NO. 817626

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Petitioner, Kimo Enterprises, Inc., 7618 5<sup>th</sup> Avenue, Brooklyn, New York 11209, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period February 1, 1999.

A small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 5 Penn Plaza, New York, New York on February 5, 2002 at 2:45 P.M. Petitioner appeared by Kamal Nasser, President. The Division of Taxation appeared by Barbara G. Billet, Esq. (Paula Tunkel).

***ISSUE***

Whether petitioner is liable for the penalty imposed by the Division of Taxation for failure to register as a dealer of cigarettes and tobacco products.

***FINDINGS OF FACT***

1. On February 3, 1999, an investigator from the Alcohol, Cigarette and Tobacco Products Bureau of the Division of Taxation ("Division") conducted a retail inspection of Kimo Enterprises, Inc. d/b/a/ Zahran Supermarket ("petitioner") located at 7618 5<sup>th</sup> Avenue, Brooklyn, New York. The investigator found that petitioner was selling tobacco products without a New

York State certificate of registration for 1999. The investigators also discovered that the owner of the store, Kamal Nasser, possessed 57.32 pounds of untaxed tobacco products which were purchased from two unregistered distributors. The investigators seized the tobacco products and Mr. Nasser was issued summonses returnable in Brooklyn Criminal Court on May 4, 1999 for (1) attempt to evade and defeat cigarette tax, (2) possession for sale of untaxed tobacco products and (3) being an unregistered distributor of tobacco products. Mr. Nasser ultimately pled guilty to section 240.20 of the penal code and paid a fine of \$50.00.

2. At the time of the inspection, petitioner did possess a certificate of registration to sell cigarettes and tobacco products issued by New York City. The inspectors left an application to register with New York State. The Division received the application from petitioner on February 9, 1999 and issued the validated license on February 22, 1999.

3. On July 1, 1999, the Division issued a Notice of Determination to petitioner, Kimo Enterprises, Inc., asserting a penalty of \$1,000.00 for the period February 1, 1999 for failure to possess a valid certificate of registration for retail sales of cigarettes and tobacco products. The penalty was imposed pursuant to Tax Law § 480-a(3)(a).

The Division did not assess any penalties for possessing untaxed tobacco products.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

4. Petitioner argued that the 1999 application for registration was timely filed with the Division prior to the inspection on February 3, 1999; however, the application was returned by the Division because it was incomplete. Petitioner asserts that the application was resubmitted to the Division and was pending validation when the inspection occurred.

The Division maintains that it has no record of petitioner's filing an application for registration before February 9, 1999. The practice of the Division is to mail renewal applications to registered dealers in August of each year and issue validated licenses in December. The due date for renewals is January 1 pursuant to Article 20 of the Tax Law. Petitioner also registered after January 1 for each of the years 1998, 2000 and 2001.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 480-a(1)(a) provides that every retail dealer of cigarettes and tobacco products is required to register with the Division and publicly display a certificate of registration in each place of business in New York State.

Tax Law § 480-a(3)(a) provides that any retail dealer who violates the above provision shall for a first violation be liable for a civil fine not to exceed \$1,000.00 and for a second or subsequent violation within three years following a prior finding of a violation be liable for a civil fine not to exceed \$2,500.00.

B. Petitioner registered with New York State as a retail dealer of cigarettes and tobacco products for the years 1998, 1999, 2000 and 2001. In each of the years, petitioner failed to obtain its license by January 1. Petitioner failed to present any credible evidence to establish that the 1999 application was timely filed with the Division and returned for incomplete information. Instead, the evidence established that petitioner violated Tax Law § 480-a(1)(a) each year and sold tobacco products while unregistered for an unspecified period of time in 1998, 2000 and 2001. For 1999, petitioner was unregistered on February 3, 1999 when the investigators inspected the premises and was also found to be in possession of 57.32 pounds of untaxed

tobacco products. Accordingly, the Division properly assessed a penalty of \$1000.00 pursuant to Tax Law § 480-a(3)(a).

C. The petition of Kimo Enterprises, Inc. is denied and the Notice of Determination issued July 1, 1999 is sustained.

DATED: Troy, New York  
April 4, 2002

/s/ Arthur Johnson  
PRESIDING OFFICER